(2009) 09 DEL CK 0009

In the Delhi High Court

Case No : EX.P. 265 of 2002 and EAs 24, 33, 237-38, 601-02, 611, 645 of 2007, 137, 344 and 458 of 2009

Cement Corporation of India Ltd. APPELLANT

Vs

Raj Kishan and Co. RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 21 Rule 22, Order 21 Rule 49, Order 21 Rule 50, Order 21 Rule 54
Income Tax Act, 1961 — Section 45
Partnership Act, 1932 — Section 25

Citation : (2009) 09 DEL CK 0009

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rakesh Tiku, Nivedita Bora and Sangmitra Sawant, for the Appellant; R.P. Kapur in EA No.601/2007, Ajay Kohli, Kalicharan, A.R. and Rajesh Manchanda and Puneet Agrawal in EA No. 611/2007, for the Respondent

Judgement

S. Muralidhar, J.—This petition by the Cement Corporation of India (CCI), the Decree Holder (DH) seeks execution of the decree dated 2nd August 2002 in Suit No. 1743 of 1993. By the said decree, the Award dated 21st June 1993 of the learned Arbitrator was made Rule of Court. In terms of the Award, the counter-claim filed by the DH in the said arbitration against M/s Raj Kishan & Company, the Judgment Debtor (JD), was allowed and it was directed that the JD should pay the DH a sum of Rs. 44,08,115.80 within thirty days of publication of the award failing which interest @ 18% per annum shall be payable. In the event of the JD returning the materials to the DH as stated in the reasons to Claims No. 2 and 3, the aforementioned amount would stand reduced depending on the quantities of the materials returned.

The execution petition

2. This execution petition was filed on 11th October 2002, shortly after the expiry of two months after the decree. In the execution petition in Column 5, it

was indicated by the DH that a total sum of Rs. 23,78,957/- had been received from the JD by way of three demand drafts and that the amount with the interest due in terms of the decree worked out to Rs. 62,54,799/-. The DH has since filed the calculations of the amount due to it as on 31st August 2009 and this works out to Rs. 88,97,813/-.

3. In Column 10, it was stated that the JD owned and possessed Flat No. 206 at Kaisons House, 84, Nehru Place, New Delhi110019. Accordingly, at the hearing of the execution petition on 29th November 2002, this Court prohibited the JD till further orders from transferring or creating a charge on the aforementioned property. At the hearing on 13th November 2003, this Court was informed that the warrant of attachment had been returned unexecuted as the DH did not assist the bailiff. A fresh warrant of attachment was issued returnable on 9th February 2004.

4. The DH filed EA No. 33 of 2004, seeking modification of the order dated 29th November 2002. In the said application, it is stated that the aforementioned property did not belong to the JD and accordingly on enquiry the DH found that the JD was owner of the Flat Nos. 302 to 305 at the third floor of the Kaisons House, 84 Nehru Place, New Delhi. Accordingly, it was prayed that the attachment on the property No. 206, Kaisons House, be released and fresh warrants of attachment be issued in respect of the Flat Nos. 302 to 305, Kaisons House.

5. On 9th March 2004, EA No. 33 of 2004 was allowed to the extent that the property at flat No. 206, Kaisons House, Nehru Place was released from attachment. As regards the issue of warrants of attachment in respect of the Flat Nos. 302 to 305, it was directed that the DH will file an affidavit in support of the said assertion. The affidavit came to be filed on 4th November 2004. It was stated in the affidavit that the DH had engaged the services of M/s Lancers Network Ltd., for verifying the address of the JD and that an investigation report had been submitted by the said organization on 10th August 2004.which revealed that properties at Flat Nos. 302 to 305, 3rd Floor, Kaisons House, 84 Nehru Place, New Delhi belonged to the JD. Flat No. 302 was its registered office. The Directors of the Company were Mr. Roshan Lal Gupta (Managing Director); Mr. Santosh Kumar Garg and Mr. Ashwani Kumar Gupta. It was further pointed out that the aforementioned immovable properties were registered with the House Tax Department in the name of Mr. Raj Kishan Aggarwal. Ex.P. No. 265/2002 Page 4 of 34

6. On the basis of the said affidavit, this Court by an order dated 14th January 2005 directed issuance of warrants of attachment against the aforementioned properties, returnable on 11th April 2005.

7. On 11th October 2006, it was directed by this Court that in view of the attachment having been effected, the properties should be sold. The case was directed to be listed before the Joint Registrar (JR) on 15th November 2006 for

taking steps for sale of the properties.

Applications by the objectors

8. An EA No. 24 of 2007 was filed by the DH under Order XXI Rule 64 CPC in this Court for directing sale by public auction of the properties. By an order dated 18th January 2007, notice was directed to issue to the JD and the matter was directed to be re-notified for completion of the pleadings qua the said auction on 6th March 2007. On 23rd August 2007 none appeared for the JD and it was noticed on that date by the learned JR that the process fee had not been filed. On a perusal of the case file, it was noted that the property had already been directed to be sold. It was directed that the proclamation of the auction sale be affixed on a conspicuous portion of the property as well as on the notice board of this Court. The proclamation was also to be published in the local newspapers in the English and Hindi editions for 12th October 2007. It was directed that "the attached immovable property of the judgment debtor be sold in an open auction by the Court Auctioneer in the manner prescribed on 30th November 2007 on taking steps by the Decree Holder". The case was re-notified for 10th January 2008.

9. EA No. 601 of 2007 was filed by M/s Teknow Consultants & Engineers Pvt. Ltd. (Teknow) under Order XXI Rules 59, 66 and 54 of the CPC, praying for stay of the proclamation and sale of the properties. The said EA was filed on 17th November 2007. On the same date, EA No. 602 of 2007 was filed by Teknow under Order 1 Rule 10 CPC, seeking impleadment of Teknow as a party in the execution petition. In both the applications, the averments were similar. It was stated that after coming to know of the sale proclamation, Teknow learned that the property at Flat Nos. 302 to 304 were being put up for public auction sale on 30th November 2007; the said properties stood in the name of Teknow which was not arrayed as a party. Regarding Flat No. 304 papers were under process. It was asserted that the Teknow had a right to be served notice and also to be heard. In para 9 of the application, it was stated as under:

That the properties being Flats Nos. 302, 303 and 304, 3rd Floor, Kaisons House, 84, Nehru Place, New Delhi-110 019 were never nor are the properties of Judgment-debtor nor are belonging to Judgment-debtor nor the Judgment-debtor has power to dispose of the same. Even otherwise, the attachment and sale is the extreme step and it was only fair to require the Judgment-debtor or may be said M/s. Raj Kishan & Co''s partners (Mr. Santosh Kumar Garg son of Mr. Dev Dutt Aggarwal and Mr. Ashwani Kumar Gupta son of Mr. Raj Kishan Dass) in accordance with law and procedure to satisfy the decree. There is nothing on record to show that Judgment-debtor has resisted the execution.

10. It was asserted that Teknow had nothing to do with the JD and that someone claiming to have read the public notice about the sale proclamation of the properties and picked the notice dated 8th October 2007 and gave it to Teknow. Thereafter Teknow downloaded the order of this Court from the internet. It was

then asserted in para 13 as under:

The decree is dated 02-08-2002. As per partnership deed, the partnership is only liable to satisfy the decree. The applicant has not come in the way of Petitioner realizing the satisfaction from the partnership firm/its partners. M/s. Raj Kishan & Co. and M/s. Teknow Consultants & Engineers Private Limited are wholly different and unrelated in all respects. There was no order binding retired partner Mr. R.L. Gupta - HUF.

11. The other details given by Teknow in its applications were that the last that applicant heard of the said Judgment-debtor firm was that it has two partners, viz., Mr. Santosh Kumar Garg son of Mr. Dev Dutt Aggarwal and Mr. Ashwani Kumar Gupta son of Mr. Raj Kishan Dass since 01-04-1994. Flats No. 304, 3rd Floor, Kaisons House, 84, Nehru Place, New Delhi-110 019 had been disposed of to Teknow in satisfaction of certain other proceedings pending before the Criminal Court. During the pendency of the proceedings in this Court in Suit No. 1743 of 1993, there was no communication from the High Court or the DH to Mr. R.L. Gupta-HUF or to Teknow. The first liability to satisfy the decree was only on Mr. Santosh Kumar Garg and Mr. Ashwani Kumar Gupta. There was no notice to attach the properties of the partners of M/s Raj Kishan & Co. The said application of Teknow was supported by the affidavit of Mr. Sushil Gupta, s/o Mr. Roshan Lal Gupta. Even in the supporting affidavit, the contention was that Flat Nos. 302 to 304 were "neither at present nor ever were the properties of Judgment-debtor (firm) nor that of R. L. Gupta-HUF. Nor is it true that said properties were ever attached." It was further asserted that the said properties were always free from any kind of seizure/attachment and were/are available to Teknow.

12. Annexure A-4 to the application was the copy of the Deed of Retirement dated 31st March 1994 between R.L. Gupta, s/o Late Dev Dutt Aggarwal Karta of R.L. Gupta HUF; Mr. Santosh Kumar Garg, s/o Late Dev Dutt Aggarwal, Karta of S.K. Garg - HUF and Mr. Ashwani Gupta s/o Late Mr. Raj Kishan Dass Aggarwal, Karta of Raj Kishan Dass & Sons - HUF. In the retirement deed it was stated in the preamble that the said parties entered into a partnership on 8th April 1988 under the name and style of Raj Kishan & Co. By the retirement deed, the first party, i.e., R.L. Gupta retired from partnership from 31st March 1994, relinquishing his rights in the firm. The second and third parties relinquished their rights and interests in the contracts mentioned in the deed of retirement in favour of Mr. R.L. Gupta and his assignees Mr. Shekhar Gupta and Mr. Shishir Gupta. They were contracts with the Haryana State Electricity Board. Annexure A-5 was a copy of the partnership deed dated 1st April 1994 between Mr. Santosh Kumar Garg, s/o Dev Dutt Aggarwal representing Karta of HUF and Mr. Ashwani Kumar Gupta, s/o late Mr. Raj Kishan Dass representing Karta of HUF - Raj Kishan Dass & Sons, reconstituting the partnership of Raj Kishan & Co., with effect from 1st April 1994. The profit and losses of firm were to be divided in the ratio of 50:50.

13. EA No. 611 of 2007 was filed on 23rd November 2007 by Deepti Gupta under

Order XXI Rules 58 and 59 CPC. She asserted that she was the lawful owner of the Flat No. 305, 3rd Floor, Kaisons House, 84 Nehru Place, New Delhi. She had recently come to know through public notice dated 12th October 2007 that the said property was the subject matter for public auction to be conducted on 30th November 2007. It was stated that Mr. Santosh Kumar Garg in his individual capacity was the sole owner of the said property allotted to him by an Agreement dated 31st March 1978 flat Nos. 302, 303, 304 and 305, 3rd Floor, Kaisons House, 84 Nehru Place, New Delhi were jointly purchased by Mr. Santosh Kumar Garg, Mr. R.L. Gupta and Mr. Raj Kishan Dass having 1/3rd share each in the said properties in their individual capacities. Later in the year 2006 the said three persons divided their joint shares in the properties and Flat No. 305 came to the share of Mr. S.K. Garg, the father of Ms. Deepti Gupta. Thereafter on the request of Mr. S.K. Garg, M/s. Skyway Builders executed a fresh agreement dated 12th April 2007 in respect of the said Flat No. 305 in favour of Mr. S.K. Garg which he was holding in his individual capacity. It was submitted that while S.K. Garg - HUF was a partner of JD firm, the property in question was not held by the said entity but by Mr. S.K. Garg in his individual capacity. It was further added that the JD firm had been paying rent to Mr. S.K. Garg in his individual capacity. In para 4 of the application, it was stated that "S.K. Garg who is also the father of the Applicant, has given the said property to the Applicant and vide letter dated 6.8.2007 has requested to the said M/s Skyway Builders to substitute the name of the Applicant in his place as intending purchaser/Owner". A copy of the said letter has been annexed to the application. It is stated that since Ms. Deepti Gupta was neither a partner nor has any interest in the JD firm, the DH may not have any claim against Flat No. 305. Accordingly, a stay of the proclamation of sale and release of attachment in relation to Flat No. 305 was sought.

14. EA Nos. 601 and 602 of 2007 by Teknow were listed on 26th November 2007. Notice was accepted in the applications by the DH. The applications were directed to be listed on 12th May 2008. Likewise EA No. 611 of 2007 which was listed on 28th November 2007 was directed to be listed on the same date, i.e. 12th May 2008. Thereafter EA No. 645 of 2007 was filed by one D. Moitra claiming to be the owner of Flat No. 304 objecting to the auction sale of the flat. Notice was issued and the said application was also directed to be listed on 12th May 2008.

15. The auction sale did take place on 30th November 2007. A note was put up by the Registry seeking directions for keeping the amount received in a fixed deposit. By an order dated 8th January 2008 it was directed that the Registry may keep the amount received from the auction purchaser in a fixed deposit initially for a period of one year subject to further directions of the Court. On 10th January 2008, the Report of the learned Court Auctioneer was taken on record.

16. A fresh EA No. 237 of 2008 was filed by Mr. R.L. Gupta. EA No. 238 of 2008 was filed by Mr. Shishir Gupta seeking stay of the sale proclamation. In these

applications notice was directed to issue returnable on 7th August 2009. Orders of this Court

17. At the hearing on 5th February 2009, the Auction Purchaser represented by Mr. Rajesh Manchanda, learned Advocate also appeared. A detailed order was passed on that date by this Court as under:

In this execution of money decree Flats No. 302, 303, 304 and 305 on the third floor of Kaisons House, 84, Nehru Place, New Delhi, stated by the decree holder to be belonging to the judgment debtor M/s Raj Kishan & Co. a partnership firm, were first attached and thereafter ordered to be auctioned. Auction was held on 30th November, 2007 and M/s Padam Marketing Ltd. gave the highest bid of Rs. 1.36 crores for all the flats and was declared as the Auction Purchaser.

EA No. 601/2007 was filed by M/s. Teknow Consultants & Engineering Pvt. Ltd. claiming to be owner of Flats No. 302 & 303; EA No. 645/2007 was filed one Sh. Ashwani Gupta claiming to be owner of Flat No. 304 and EA No. 611/2007 was filed by one Ms. Deepti Gupta claiming to be owner of Flat No. 305. It was ordered on 26th November, 2007 that the auction may go on but the sale of the aforesaid flats will be subject to the condition that the sale shall be confirmed only after the applications are disposed of. The matter is since pending at that stage only.

The counsel for the auction purchaser M/s Padam Marketing Ltd. has argued that in spite of having paid the entire sale consideration of Rs. 1.36 crores in terms of the auction and having complied with other terms of the auction, he has not been put into possession of the flats and the flats are lying locked. He has submitted that if the disposal of the objections of three separate objectors aforesaid is likely to take time, the sale consideration minus some earnest deposit be returned to him, though he continues to be interested in purchasing the flats and undertakes to deposit the balance sale consideration immediately on the objections being disposed of. His grievance is justified.

During the hearing, it has been informed that EA No. 601/2007 on behalf of M/s. Teknow Consultants & Engineering Pvt. Ltd. has been filed by one Sh. Shishir Gupta who is the son Sh. R.L. Gupta. It is not disputed by the counsel for the M/s. Teknow Consultants & Engineering Pvt. Ltd. that Sh. R.L. Gupta HUF of which Sh. R.L. Gupta was the karta, was the partner of the judgment debtor firm up to 31st March, 1994. Sh. R.L. Gupta is the Chairman and the Managing Director of the said M/s. Teknow Consultants & Engineering Pvt. Ltd.

It is also the admitted position that the applicant in EA No. 645/2007 namely Sh. Ashwani Gupta is son of Late Sh. Raj Kishan Dass Gupta who was a partner in the judgment debtor firm till his demise in 1988. The said Sh. Ashwani Gupta thereafter became a partner in the judgment debtor firm and continued to be a partner of the judgment debtor. It is stated that in fact Sh. Raj Kishan Dass Gupta HUF was a partner in the judgment debtor firm.

The applicant in EA No. 611/2007 Ms. Deepti Gupta is daughter of Sh. Santosh Kr. Garg and it is stated that Sh. Santosh Kr. Garg HUF was the partner in the judgment debtor firm.

Neither of the three objectors have filed the Flat Buyers Agreement with respect to the flats of which they claim ownership. Judicial notice can be taken of the fact that ordinarily, there are no registered sale deeds of the flats such as these; they are normally transacted through a Flat Buyers Agreement. Neither of the three objectors have filed any original documents of title in their favour with respect to the flats of which they claim the ownership and with respect to which they have filed objections, holding up the delivery of possession of the flats to the Auction Purchaser. On being quizzed about the same, the counsel for the applicant in EA No. 601/2007 states that the original title documents were handed over to Mr. Anil Sachdeva in pursuance to an agreement to sell by the said M/s. Teknow Consultants & Engineering Pvt. Ltd. of Flats No. 302 & 303 to the said Mr. Anil Sachdeva. It is not disputed that Mr. Anil Sachdeva is the Managing Director of the Auction Purchaser M/s Padam Marketing Ltd. It is stated by the objector in EA 601/2007 that the buyer Mr. Anil Sachdeva after entering into an agreement to sell did not pay the balance sale consideration, as such the agreement to sell did not fructify but the original title documents remained with Mr. Anil Sachdeva.

The counsel for the Auction Purchaser M/s Padam Marketing Ltd. confirms that Mr. Anil Sachdeva had prior to auction entered into an agreement to purchase all the four flats from Mr. Roshan Lal Gupta, Mr. Santosh Kr. Garg and Mr. Ashwani Gupta (on behalf of the late Sh. Raj Kishan Dass Gupta).

The decree holder has filed replies to all the three sets of objections.

Before the said three objections are put to trial, this Court has to be prima facie satisfied of the title of the objectors to the aforesaid flats which were attached and subsequently auctioned. Since it has transpired that the objectors are closely related to the judgment debtor, and further since it is the contention of the decree holder that the objections are merely a device to delay the execution, and further since the objections are found to be cryptic and without original documents, it is deemed expedient to direct as under:

1. All the three objectors, since they have already for the last over one year held up the delivery of possession of the flats to the Auction Purchaser, to file an undertaking in this Court in the form of their affidavit, specifying the properties and assets held by them and from which the damages which would accrue to the Auction Purchaser for the delay caused by them can be satisfied.

2. The Auction Purchaser to file an affidavit stating the letting value of the aforesaid flats in the year 2008 and at the present.

3. The objectors to in their undertaking aforesaid, to undertake to this Court that in the event of their objections not succeeding, they will pay to the Auction Purchaser damages calculated at the letting value of the said flats as disclosed

by the Auction Purchaser. If the objectors differ with the letting value disclosed by the Auction Purchaser, the objectors to in their own affidavits state the letting value of the said flats.

4. The objector M/s. Teknow Consultants & Engineering Pvt. Ltd. to file an affidavit disclosing the share holding and the position of the directors of the said company from time to time.

5. All the three objectors to file affidavits disclosing as to on which date they acquired title to the respective flats claimed by them, by what documents and against what consideration and from whom.

6. All the three objectors to also file documents of their respective titles along with their affidavits and to state in the affidavit that besides the said documents there are no other documents in their power and possession.

The affidavit by the Auction Purchaser be filed within one week and the affidavits/ undertaking be filed by the objectors within three weeks from today. Further directions on the request of the Auction Purchaser for refund of the sale consideration are deferred for the time being.

Court notice be also issued to M/s Skyway Builders stated to be the builders of Kaisons House and who are stated to have issued certificates relied upon by the objectors, at the address of 1 Babar Road, New Delhi-110001 and also at the address of Mangalam, R -50, Vikas Marg, Delhi-110092 directing them to file an affidavit before this Court of their authorized person disclosing as per their records to whom were the aforesaid Flats No. 302-305 sold/ allotted in the first instance and the dates of transfer, if any, of the said four flats from time to time along with documents in proof thereof. The authorized person of M/s Skyway Builders is also directed to be present before the Court with the original documents on the next date of hearing.

The counsel for the objector M/s. Teknow Consultants & Engineering Pvt. Ltd. who has filed a certificate dated 20th August, 2007 of the said M/s Skyway Builders in support of his objections to ensure service of the said notice on M/s Skyway Builders and compliance thereof. It appears that initially the decree holder had disclosed the judgment debtor to be owner of Flat No. 206 in the same building and given the same address of judgment debtor. However, subsequently it was informed that the judgment debtors are owners of Flats No. 302-305 and not of Flat No. 206. The counsel for applicant in EA No. 601/2007 sought to make much out of it. The said fact is not found relevant for present purpose List on 26th March, 2009.

18. Pursuant to the aforementioned order, the auction purchaser M/s Kadam Marketing Ltd. (which has been wrongly mentioned in the order dated 5th February 2009 as "Padam Marketing Ltd.") has also filed an affidavit dated 11th February 2009. At the hearing on 26th March 2009, a last opportunity was given by the Court for the directions issued in the order dated 5th February 2009 to be

complied with. The Court was informed that the Flat Nos. 302-305 were lying vacant under lock and key of the police under the complaint of the auction purchaser. The objectors as well as the auction purchaser were directed to bring proposals for letting out the flats to the prospective tenants. The offer of the auction purchaser to take the flats on rent of Rs. 50 per sq. ft. per month with effect from 1st April 2009 was objected to by the objectors. The amount placed in the fixed deposit was renewed on 28th May 2009 for one year.

19. At the hearing on 8th July 2009 this Court perused the affidavit of M/s Skyways Builders and passed the following order:

1. From the affidavit of M/s. Skyway Builders filed on 23rd March 2009 it appears that in respect of Flat Nos. 302, 303, 304 and 305 in Kaisons House, Nehra Place, New Delhi, four separate flats buyer''s agreements, each dated 28th July 2006, were executed in the names of S/Mr. Ashwani Gupta, Roshan Lal Gupta and Santosh Kumar Garg. Later, on 26th February 2007, upon these allottees claiming that they had misplaced/lost their respective copies of the agreements, duplicate agreements appear to have been issued. It is now stated that the agreement pertaining to Flat Nos. 302 and 303 was in the name of Roshan Lal Gupta, in respect of Flat No. 304 in the name of Ashwani Gupta and Flat No. 305 in the name of Santosh Kumar Garg. Further changes appear to have been made at the request of these allottees and current status in respect of the allotment of the flats is stated to be as under:

9 (a) Flat No. 302-303 measuring 535 sq.ft. in name of M/s. Technow Consultants & Engineers Pvt. Limited through its Director Mr. Shishir Anand Gupta son of Sh. Roshan Lal Gupta having its registered office at A-8, Ground Floor, Sector-33, Noida - 201301.

(b) Flat No. 304, measuring 533 sq.ft. in name of M/s. Technow Consultants & Engineers Pvt. Ltd through its Director Mr. Shishir Anand Gupta son of Mr. Roshan lal Gupta having its registered office at A-8, Ground Floor, Sector-33, Noida - 201301.

(c) Flat No. 305, measuring 533 sq.ft. in name of Mrs. Dipti Gupte wife of Mr. Nishit Gupta, resident of 107, New Rajdhani Enclave, Vikas Marg, Delhi - 110 092.

2. It is requires to be examined whether in relation to the Judgment Debtor the flats belonging to the above individuals were amenable to be sold in execution of the decree obtained by the Petitioner/Decree Holder, Cement Corporation of India Limited. Mr. Tikku, learned Counsel for the Decree Holder states that he will address detailed arguments on this aspect on the next date of hearing.

3. Copies of the affidavit of M/s. Skyways Builders have been supplied to learned Counsel for the other parties. A representative of M/s. Skyways Builders will remain present in Court along with the original documents on the next date of hearing.

4. List on 11th August 2009.

20. The submissions of the learned Counsel were heard at length on 19th and 20th August 2009. On 20th August 2009, the learned Court Auctioneer Mr. K.L. Chaudhary was present in Court and made a statement in continuation of the report submitted by him to the Court on 8th January 2008. The said statement is placed on record.

21. After the orders were reserved, a fresh EA No. 458 of 2009 was filed by Teknow seeking to place on record their written submissions and certain decisions relied upon by them. This application was heard on 26th August 2009 and orders were reserved.

Submissions of counsel

22. Mr. Rakesh Tiku the learned Counsel appearing for the DH submits that the plea of the objectors that they had nothing to do with the JD firm and therefore the properties which stood in their names should not be attached, was unacceptable. He submitted that a careful perusal of the transactions through which the objectors are now claiming title, would show that these transactions had been entered into only to defeat the execution of the decree. The objectors are all related in one way to each other or to the JD firm. The JD itself had not come forward to object to the execution of the decree. In the circumstances, the applicants could not possibly question the decree itself. If the decree was valid and executable, then it was for the objectors to show that they had valid title to the properties in question having purchased them for consideration. If the objectors were not able to satisfy the court that the transactions through which they were claiming title were bona fide, then the auction sale had to be confirmed and the consequences had to ensue.

23. According to Mr. Tiku, it was plain from the affidavit of M/s Skyway Builders that although initially the four flats were jointly in the names of Mr. Raj Kishan Dass, Mr. Roshan Lal Gupta and Mr. Santosh Kumar Garg, the substitution thereafter of other parties was not for any consideration but merely by letters being written to the builders to substitute their names. Thus on the death of Mr. Raj Kishan Dass on 17th September 1987 a letter was written by his wife Smt. Prakashmati in March 2006 stating that none of the legal heirs had any objection to the substitution of Mr. Ashwani Gupta as an allottee along with the co-allottees. Accordingly, the builder complied with this request and appended an endorsement to the original Agreement dated 31st March 1978. Further, again on the request of the co-allottees, four separate agreements were executed in respect of each of the said four flats on 28th July 2006. However, the co-allottees continued to be Mr. Ashwani Gupta, Mr. Roshan Lal Gupta and Mr. Santosh Kumar Garg.

24. On 27th February 2007, the co-allottees wrote to the builder stating that they had misplaced/lost their copy of the said agreements and produced a copy of the FIR (vide Page No. 30/2007) and DD 15 dated 26th February 2007 filed to that effect. Fresh agreements were drawn up whereby Flat Nos. 302-303

measuring 534 sq. ft. was in the name of Mr. Roshan Lal Gupta; Flat No. 304, measuring 533 sq. ft. in the name of Mr. Ashwani Gupta and Flat No. 305, measuring 533 sq. ft. in the name of Mr. Santosh Kumar Garg. On 6th August 2007 Mr. Roshan Lal Gupta co-allottee in respect of Flat Nos. 302-303, 3rd Floor, Kaison House, 84 Nehru Place requested for substitution of the name M/s Teknow Consultants & Engineers Pvt. Ltd. through its Director, Mr. Shishir Gupta s/o Mr. Roshan Lal Gupta. Mr. Ashwani Gupta on 20th August 2007 requested for substitution of M/s.Teknow in respect of Flat No. 304. On 6th August 2007 Mr. Santosh Kumar Garg requested for substitution of the name of allottee in respect of Flat No. 305 in favour of Ms. Deepti Gupta, his daughter. These requests were all carried out.

25. Mr. Tiku points out that the chain of the above transactions can leave no manner of doubt that the original partners were simply making requests to the builder to change the name of allottees. None of these allottees could be said to have derived title bonafide by making purchases of those properties for consideration. The cloak of the transactions has to be lifted and the auction sale of the properties should be confirmed.

26. As regards the liability of the partners of the firm, Mr. Tiku refers to Section 25 of the Indian Partnership Act, 1932 (Act) and in particular the judgment of the Supreme Court in Ashutosh Vs. State of Rajasthan and Others, Reference is also made to the judgment in Dena Bank Vs. Bhikhabhai Prabhudas Parekh and Co. and Others, . It is submitted that it is possible in law for a HUF to be the partner of a firm and for enforcing the liability of the firm, it was possible to proceed against the karta of HUF. A reference is made to the judgment in Rashiklal and Co. Vs. Commissioner of Income Tax, Orissa,

27. On behalf of the objectors, Mr. R.P. Kapur, the learned Counsel appearing for Teknow first submitted that there was in fact no executable decree in the present case. He submits that no decree was drawn up by this Court in accordance with law and where there is no executable decree, the execution petition is misconceived. It is submitted that the non-drawing of a decree prevented the aggrieved litigant from appealing against it u/s 96 of the CPC. Therefore it was fatal to the execution proceedings. Reliance is placed upon the judgment in 78 Indian Cases 996.

28. Secondly, it is pointed that there was a misdescription in the execution of the property alleged to belong to the JD. This petition was never amended subsequently. Once warrant of attachment of the property mentioned in the execution petition was returned unexecuted, there was no occasion for this Court to proceed to attach the properties at Flat Nos. 302-305 Kaison House, 84 Nehru Place, New Delhi.

29. It is then submitted that under Order XXI Rule 64 CPC the learned Court Auctioneer was under a bounden duty to ensure that only so much of the attached property which is sufficient to satisfy the decretal amount is put up for

auction sale. The court auction sale in the instant case had fetched Rs. 1,36,00,000/- which was far in excess of the decretal amount. The learned Court Auctioneer accordingly had failed in his duty to make an appropriate assessment of the extent and value of the attached property. Therefore the entire court auction sale stands vitiated.

30. It is repeatedly urged by the counsel for the other objectors that the partners of the JD were HUFs and not individuals whereas these flats belonged to individuals. Therefore, these flats cannot be made subject matter of the auction sale to satisfy the decree. It is submitted that the change of substitution of these objectors as allottees of the flats may not have got title for consideration but the transfer of the flats in their respective names should be treated as `gifts''. On behalf of Mr. Ashwani Gupta, it was submitted that both the award as well as the decree were ex parte. A wrong address was given in the execution petition for the JD. No prior notice was served on the JD. Consequently, the auction sale was not valid.

Prior notice to the JD

31. To take up the last point urged, a reference may be made to Order XXI Rule 22 CPC which implicitly dispenses the issuance of any notice to the JD if the execution petition is filed within a period of two years from the date of the decree. In the present case, it is not in dispute that the execution petition was filed soon after the expiry of two months from the date of the decree. Therefore, there is no merit in the contention that prior notice ought to have gone to the JD in the execution proceedings.

32. It needs to be noted that in the present case that the publication in the newspapers of the issuance of a proclamation of sale resulted in a spate of applications by the objectors, many of whom are related to the JD or are partners. It is unlikely therefore that the JD is not aware of these proceedings. The JD is also a firm in which all these persons have an interest and therefore there is no question of the JD not being in the know of the pendency of the present proceedings. The JD has not come forward till date to raise any objection.

Misdescription of the property in the execution petition

33. A serious objection has been raised as to the mis-description of the property in the execution petition. While it is true that the execution petition mentioned Flat No. 206 as belonging to the JD, that position was corrected by filing an affidavit of the DH. That affidavit explains the circumstances in which it came to be discovered that Flat Nos. 302-305 of Kaisons House belonging to the JD. In the considered view of this Court in view of an affidavit having been filed pursuant to the directions issued by this Court, the objection that the initial description of the property in the execution petition was erroneous, pales into insignificance.

The Objectors'' claims to the properties sold by public auction

34. The central issue in this case is really about the properties that have been sold through auction. The affidavit of M/s Skyway Builders explains in great detail how the changes in the name of allottees took place vis-?-vis these flats. It is plain that at various stages the original allottees got the builder to issue fresh agreements either on the ground that there was a new allottee to be substituted in place of the earlier one or that the original agreement was itself misplaced or lost. The second important feature is that each of the allottees substituted is a close relation of the original allottee. Mr. Ashwani Gupta, Mr. Roshan Lal Gupta, Mr. Santosh Kumar Garg are all related to each other and the ones substituting them are also closely related. Teknow is under the control of the sons of Mr. R.L. Gupta. Ms. Deepti Gupta is the daughter of Mr. S.K. Garg. Clearly the idea was that these properties will be kept within the control of the family. It does not take very much to see what the real nature of these transactions is. Although for the purposes of Income Tax, the HUF as a separate entity assumes significance, the liability of the karta of an HUF, which is a partner of a firm, will have to be determined with reference to the Partnership Act.

35. In Rashiklal & Co. v. Commissioner of Income Tax, Orissa, the Supreme Court was dealing with a situation of a HUF being a partner in a firm. It was observed in para 12 as under (SCC @ p.54):

12. An HUF cannot be in a better position than a firm in the scheme of the Partnership Act. The reasons that led this Court to hold that a firm cannot join a partnership with another "individual" will apply with equal force to an HUF. In law, an HUF can never be a partner of a partnership firm. Even if a person nominated by the HUF joins a partnership, the partnership will be between the nominated person and the other partners of the firm. Having regard to the definition of "partnership" and "partners" and in view of the principle laid down in Dulichand''s case (supra), it is not possible to hold that an HUF being a fluctuating body of individuals, can enter into a partnership with other individual partners. It cannot do indirectly what it cannot do directly. If a Karta or any other member of the HUF joins a partnership, he can do so only as an individual. His rights and obligations vis-a-vis other partners are determined by the Partnership Act and not by Hindu law. Whatever may be the relationship between an HUF and its nominee partner, in a partnership, neither the HUF nor any member of the HUF can claim to be a partner or connected with the partnership through a nominee. Where the Karta of an HUF enters into a partnership agreement with a stranger, the Karta alone in the eye of law is the partner. If any payment by the firm to a partner is prohibited by law, the Karta cannot be heard to say that the payment was received by him not as a partner but in some other capacity. Within the partnership, the Karta is a partner like any other partner with whom he has entered into a partnership agreement individually. It is essential to have an agreement between the partners to form a partnership. An HUF not being a "person" cannot enter into an agreement of partnership. If the Karta of an HUF enters into partnership with a stranger, upon the death of the Karta, the partnership will stand dissolved. In the absence of a contract to the contrary,

another member of the family cannot step into the shoes of the Karta claiming that the Karta was merely representing the HUF and the real partner was the HUF. A Karta who enters into a contract of partnership with a stranger may be accountable to the other members of the HUF for the profits received from the partnership business. But that is something between the Karta and the HUF. But so far as the partnership firm is concerned, the Karta is a partner like any other partner. If a commission is paid to a partner who happens to be a nominee of an HUF, the commission is not paid to the HUF. It is paid by the firm to one of its individual partners. The partner may have to account for the monies received from the firm to another person or another firm or an association of persons or an HUF. But that will not alter the fact that commission was paid by the firm to one of its partners.

36. A reference may at this stage be made to the provisions of the Indian Partnership Act, 1932 (Act). Section 25 of the Act spells out the liability of individual partners and reads as under:

25. Liability of a partner for the acts of the firm. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

37. As observed in Rashiklal & Co. (supra), the partners are bound to carry on the business of the firm to the greatest common advantage, and carry out the duties diligently in the conduct of the business. In para 24 it was explained that "the very fact that individual shares of the partners have to be specified and that such partners must personally sign the partnership deed and also the application for registration go to show that even if a person joins a firm as a representative of an HUF or any other body or association, within the firm his position is that of an individual".

38. In Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet, the Supreme Court explained (AIR @ p.57):

A partnership is a creature of contract. Under Hindu law a joint family is one of status and right to partition is one of its incidents. The Income Tax law gives the Income Tax Officer a power to assess the income of a person in the manner provided by the Act. Except where there is a specific provision of the Income Tax Act which derogates from any other statutory law or personal law, the provision will have to be considered in the light of the relevant branches of law. A contract of partnership has no concern with the obligation of the partners to others in respect of their shares of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of a joint Hindu family; he may be a trustee; he may enter into a sub-partnership with others; he may, under an agreement, express or implied, be the representative of a group of persons; he may be a benamidar for another. In all such cases he occupies a dual position. Qua the partnership, he functions in his personal capacity; qua the third parties, in his representative capacity. The third parties, whom one of the partners represents, cannot enforce their rights against the other partners nor the other partners can do so against the said third parties.

39. Section 45 of the Act states that the partners continue to be liable as such to third parties for any act done by any of them which would be the act of the firm. In Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., the Supreme Court explained the question of a liability of an individual partner of the firm as under (SCC @ p. 706):

18. The High Court has relied on Section 25 of the Partnership Act, 1932 for the purpose of holding the partners as individuals liable to meet the tax liability of the firm. Section 25 provides that every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. A firm is not a legal entity. It is only a collective or compendious name for all the partners. In other words, a firm does not have any existence away from its partners. A decree in favour of or against a firm in the name of the firm has the same effect as a decree in favour of or against the partners. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm.

40. The above law was reiterated by the Supreme Court in Ashutosh v. State of Rajasthan which is of course closer to the facts on hand. There a decree was passed in favour of a firm Sharma & Co and against the State of Rajasthan for a sum of Rs. 37,255.07p. in respect of certain construction work undertaken for the irrigation department. The firm filed an execution petition for recovery of the said sum. During those proceedings security for the said sum was furnished on behalf of the firm by Mr. Gurbachan Singh for Rs. 2,927.57p. and by Smt. Kamla for Rs. 37,592.57p. An immovable property in the form of house was also furnished as security. In the appeal filed by the State, Sharma & Co., Smt. Kamla Devi and Mr. Gurbachan Singh were impleaded as Respondents. The house which was offered as security belonged to Smt. Dhanwanti Devi, w/o Mr. Shiv Lal Sharma. She bequeathed the house to her daughter''s son Ashutosh by a Will. The States'' appeal came to be allowed. It then filed an application for restitution u/s 144 CPC. The court held that action could be taken against Smt. Kamla Devi who had offered the house as security. It was held that the State was also entitled to interest from Sharma & Co. An attachment order was then passed in respect of the house. This was resisted by Ashutosh by stating that Smt. Dhanwanti Devi who had bequeathed the house to him, was not a party at any point of time to the suit and therefore the house could not be attached. The application was dismissed by the District Judge. It was held that Dhanwanti Devi had no right to execute a Will in respect of the disputed house. One of the contentions raised was that the decree cannot be executed against a partner when the decree was against the firm and that the provisions of Order XXI Rules 49 and 50 CPC did not permit it. These contentions were negatived by the Supreme Court. Referring to the decisions in Income Tax Officer (III), Circle-I,

Salem and Another Vs. Arunagiri Chettiar, in which it was held that the "Section 25 of the Partnership Act does not make a distinction between a continuing partner and an erstwhile partner. Its principle is clear and specific viz. that every partner is liable for all the acts of the firm done while he is a partner jointly along with other partners and also severally". As regards the second point regarding compliance with the Order 21 Rules 49 and 50 CPC a reference was made to the judgment in Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others, in which it was held that "a decree may be obtained against a firm under Order 30 of the Code of Civil Procedure, and such a decree may be executed against the property of the partnership and against all the partners by following the procedure of Order 21 Rule 50 of the Code of Civil Procedure". On the facts of that case, it was held that the requirement of the rule was that decree against a firm can in execution be enforced against the partnership property. It may also be enforced against the partner which would include the separate property of the partners.

41. In the considered view of this Court, the judgments in Rashiklal & Co. and Ashutosh are a complete answer to the contentions urged by the objectors. Even though Mr. Santosh Kumar Garg, Mr. Ashwani Gupta, and Mr. Roshan Lal Gupta may have been partners of the JD firm in their capacity as kartas of their respective HUFs, their liability as partners will continue in their individual capacity. The mere fact that the partners of the JD firm were HUFs will make no difference to the position that those kartas will continue to be liable as if they were individual partners of the JD firm. Their liability for the acts of the firm is as explained in Dena Bank, Ashutosh and Rashiklal & Co. Therefore, the mere fact that the during the pendency of the proceedings in this Court as well as the execution proceedings certain changes were effected by the builder in the names of the allottees will not make any difference to the legal position regarding the partners of the JD. These changes have been made by the partners themselves by writing letters to the builder, asking for the change to be effected. No consideration has been paid for these transactions. There is no gift deed which can enable the Court to treat these transactions as gifts. There can be no manner of doubt that these are paper transactions entered into only to defeat the rights of the DH. It is held that the properties were rightly attached and sold in public auction to realise the decretal amount owing to the DH by the JD firm.

Drawing up of the decree

42. The submission on behalf of the objectors was that no decree was at all drawn up in this case and, therefore, the execution proceedings are in bad in law. A perusal of the records of suit CS (OS) No. 1743 of 1993 shows that an ex parte decree was indeed passed on 2nd August 2002. That decree made the Award dated 21st June 1993 rendered by Mr. N.C. Jain, Sole Arbitrator rule of court. The Registry while preparing the decree found that the original of the Award which was filed in Court had gone missing. A copy of the Award certified to be a true copy by Mr. A.K. Verma, the Advocate of the DH was then placed on

record. Upon a noting by the Registry the case was again placed before the Court on 28th October 2004 when the following order was passed:

On the basis of the office report the case is listed today. The decree be drawn up on the basis of the award produced by Mr. A.K. Verma and the same shall form part of the decree.

43. Thereafter the decree was drawn up which forms part of the file. The decree states that the copy of the award dated 21st June 1993 rendered by Mr. N.C. Jain, Sole Arbitrator will be taken on record and made a rule of the court. It has been specifically stated therein that "a decree is hereby passed in terms of the said Award which shall form part of the decree".

44. In view of the above, the objection that there is no decree drawn up in the present case is entirely without merit.

The Court Auctioneer

45. The objection that the Court Auctioneer did not perform his duties as Ex.P. No. 265/2002 Page 31 of 34 required under Order XXI Rule 64 CPC is without basis. The report of the Court Auctioneer dated 8th January 2008 has been perused. It explains the circumstances in which he visited the suit property and thereafter conducted the auction sale. Supplementing this report, the learned Court Auctioneer has the following statement in this Court on 20th August 2009:

On 30th November 2007 when I inspected the property in auction in order to conduct the sale then I noticed that the property bearing Flat Nos. 302-305 Kaison House, 84, Nehru Place, New Delhi was one continuous large hall of an area of approximately 1700 sq. ft. That flat Nos. 302-305 were not identifiable as separate flats and were not divisible by metes and bounds.

46. If indeed the factual position was that the four flats were in fact one whole unit, no fault can be found with the Court Auctioneer for proceeding to put up for auction sale the whole unit. The excess money after satisfying the decree will be dealt with in accordance with law upon an application being made in that behalf by the JD.

47. As regards the fees of the learned Court Auctioneer, Rule XXII of Vo.1 Chapter XII, Part-L, Delhi High Court Rules stipulates that where the sale proceeds Rs. 5,000/- a fee equivalent to 5% on Rs. 5000/- and 2.5% on the remainder will be payable. This works out to Rs. 3,40,125/-. In terms of Rule XXII(2), 80% of the said sum will be paid to the Court Auctioneer and 20% to the paid to the Government Treasury. In that view of the matter, it is directed that a sum of Rs. 2,72,000/- will be paid by the Registry to the Court Auctioneer and the balance 20% i.e., Rs. 68,125/0 be deposited in the Treasury of GNCT of Delhi by the Registry within a period of two weeks from today.

Claim of the Auction Purchaser

48. The auction purchaser has filed EA No. 344/2009 stating that the interest

that has accrued in the fixed deposit should be handed over to him. There is no provision under which the auction purchaser can make such a claim. The auction purchaser is only entitled to have the sale deed executed in his favour after confirmation of the sale by the court. He may independently proceed against any of the objectors for any loss he may have suffered on account of the present proceedings and the delay that has ensured in the sale deed being executed in his favour. The application is accordingly dismissed. Conclusion and Directions

49. For the above reasons, this Court in exercise of its powers under Order XXI Rule 92 CPC confirms and makes absolute the auction sale of the properties conducted by the learned Court Auctioneer on 30th November 2007. Under Order XXI Rule 94 CPC, this Court directs that a certificate shall be granted to the auction purchaser specifying the property sold. The certificate shall bear the date of this order. Since the property is vacant and lying under the lock and key, it is directed that vacant possession of the property be delivered to the auction purchaser within a period of two weeks after the corrected Flat Buyers'' Agreement is drawn up and issued.

50. It was noticed by this Court in the order dated 5th February 2009 that "judicial notice can be taken of the fact that ordinarily there are no registered sale deeds of the flats such as these; they are normally transacted through Flat Buyers'' Agreement" [see also the decision dated 28th May 2009 in CS(OS) No. 2140/1998 - Guru Ram Das Bhawan v. Doon Apartments Pvt. Ltd.]

51. In that view of the matter, a direction is issued to M/s Skyway Builders through its Proprietor Dr. Kusum S. Chand as represented by the Power of Attorney, Kalicharan Mahto who is the Manager and who has filed the affidavit dated 23rd March 2009 in the proceedings to enter the name of the decree holder as the allottee of flat Nos. 302-305 Kaison House, 84 Nehru Place, New Delhi-110 019 and issue the necessary corrected Flat Buyers'' Agreement effecting this change within a period of two weeks from today.

52. As per the calculation submitted by the DH on 29th August 2009, the amount due to the DH as on 31st August 2009 works out to Rs. 88,97,813/-. This is after accounting for the amounts already received by it through encashment of Bank Guarantees submitted by the JD. It is accordingly directed that from the money accrued in the fixed deposit (inclusive of interest), the DH will be paid an amount of Rs. 88,97,813/-. From the balance amount, the learned Court Auctioneer will be paid a sum of Rs. 2,72,000/-. A sum of Rs. 68,125/- will be deposited in the Government Treasury, Govt. of NCT of Delhi. All the above payments will be made, upon proper identification of the recipient, by the Registry by way of banker''s cheque/demand draft within a period of two weeks from today. The balance amount will be kept in a fixed deposit and kept renewed from time to time. As and when the JD applies for release of the balance amount to it, then such application will be placed before the Court for orders. A compliance report be placed on the file.

53. With the above directions, EA Nos. 601, 611, 645 of 2007 are dismissed with costs of Rs. 10,000 each which will be paid by each of the applicants to the DH within a period of four weeks from today. The auction purchaser''s EA No. 344/2009 is dismissed. The other applications i.e. EA Nos. 24, 33/2007, 137/2009, 602/2007, 237, 238, 458/2009 stand disposed of. The Execution Petition is closed.

54. Order dasti. A certified copy of this order be delivered to M/s. Skyway Builders within three days for compliance with the directions contained in para 51 of this judgment.

